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94-1652

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States
October Term, 1994

SEAN CHAMBERS

and

LARRY CLOSSER

Petitioners,

v.

DAVID L. PELFREY

Respondent.

Petition For Writ Of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

MOTION OF RESPONDENT DAVID L. PELFREY
TO PROCEED IN FORMA PAUPERIS

The Respondent, David L. Pelfrey, asks leave to file the attached Brief in Opposition, without prepayment of costs and to proceed in forma pauperis.

Respondent is presently incarcerated. He has been granted leave to proceed in forma pauperis in both the United States District Court and the Court of Appeals.

The Affidavit of David L. Pelfrey, Respondent, in support of this motion is attached hereto.

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In The
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SEAN CHAMBERS

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AFFIDAVIT OF DAVID L. PELFREY

STATE OF OHIO)
)SS:
COUNTY OF FRANKLIN)

I, Respondent David L. Pelfrey, being duly sworn, do hereby depose and state:

1. I am presently incarcerated at the Correctional Reception Center, #308-851, P.O. Box 300, Orient, Ohio 43146. I have been incarcerated since April 13, 1995.

2. I am without funds to pay the fees and costs for opposition to the motion for certiorari that has been filed in the above-entitled case.

3. In 1994, I earned a total of $1,317 from employment. I earned no money from rent payments, interest, dividends pensions, annuities, life insurance payments, gifts, inheritances or any other source.

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4. I have no money in checking or savings accounts. At present, I have no cash and approximately $75.00 in my prison account.

5. I have no interest in real estate, stocks, bonds, notes, automobiles or other valuable property. My possessions are limited to clothing and a few personal items.

6. I receive no financial support from family members, and I have no dependents.

I understand that a false statement in this affidavit will subject me to penalties for perjury.

David L. Pelfrey

David L. Pelfrey

Sworn to and subscribed in my presence this 3 day of May, 1995.

Glennadine M Hess

Notary Public

GLENNADINE M. HESS
Notary Public, State of Ohio
My Commission Expires July 7, 1996
Recorded in Pickaway County

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To the United States Court of Appeals
For the Sixth Circuit

BRIEF OF RESPONDENT DAVID L. PELFREY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ALPHONSE A. GERHARDSTEIN
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QUESTION PRESENTED FOR REVIEW

Proposed by Petitioner:

1. Whether an isolated and unauthorized assault by a guard upon a prison inmate constitutes "punishment" within the meaning of the Eighth Amendment prohibition against cruel and unusual punishment.

Proposed by Respondent David L. Pelfrey:

2. Whether the Eighth Amendment is violated by prison guards who, without provocation, restrain an inmate and then use a knife to menacingly slice the hair from the inmate's head.

OPINIONS BELOW

Respondent adopts the statement of the petitioners.

JURISDICTION

Respondent adopts the statement of the petitioners.

CONSTITUTIONAL PROVISION INVOLVED

Respondent adopts the statement of the petitioners.

I. STATEMENT OF THE CASE

A. Introduction

This case is about an attack by two prison guards on an inmate, David Pelfrey. Petitioners Sean Chambers and Larry Closser, guards at the London Correctional Camp, restrained Mr. Pelfrey and menacingly used a knife to slice the hair from his head. Defendants claim that this ancient form of punishment should no longer be recognized under the Eighth Amendment. The Sixth Circuit Court of Appeals correctly rejected that argument. This case certainly does not deserve Supreme Court review.

B. Statement of Facts

David Pelfrey, a prisoner at the London Correctional Institution (LCI) on January 2, 1992, alleged in his complaint that he was assaulted that day by petitioners Sean Chambers and Larry Closser:

> On January 2, 1992, after returning from my job assignment, I went to the Upstairs Office

> at the London Correctional Camp, where I reside, to obtain my mail. Correction Officers (and Defendants) Chambers and Closser were in the office. I asked Officer Closser for my mail. I was responding to a question from Officer Closser when he started walking around from where he had been standing behind the desk. He (Officer Closser) pulled out his knife as he walked towards me. When he got within reach of me, Officer Closser put one hand on my shoulder and the other one on top of my head. I instinctively put my hands on top of my head, and at that time, Officer Chambers pulled his knife out and grabbed my hands, forcing them down to my side. Officer Closser then proceeded to cut my hair with his knife. After cutting off a great portion of my hair, Officer Chambers then let me go, and he (Officer Chambers) stood there grinning and smiling, while officer Closser was laughing and dropping my hair on the floor. These officers had me scared, intimidated, and threatened.

Pelfrey filed an Informal Grievance following the event. He contacted the Institution Inspector and the Warden. Following an investigation, petitioners were each given four days of administrative leave. Pelfrey v. Chambers, 43 F.3d 1034, 1035 (6th Cir. 1995). Soon thereafter, Pelfrey filed the complaint in this case, requesting damages and injunctive relief.

Petitioners denied all of the factual allegations in Pelfrey's complaint, and alleged that it failed to state a claim. Petitioners moved for judgment on the pleadings, arguing that even if they had cut Pelfrey's hair with a knife without provocation, their actions were not taken with a penological or disciplinary purpose and therefore did not constitute "punishment" under the meaning of the Eighth Amendment.

C. Decisions Below

The District Court granted petitioners' motion, relying upon Johnson v. Glick, 481 F.2d 1028 (2d Cir.), cert. denied, 414 U.S. 1033 (1973) and George v. Evans, 633 F.2d 413 (5th Cir. 1980). The district court held that an unprovoked and unjustified assault by a prison guard does not fall within the meaning of punishment for Eighth Amendment purposes.

The Sixth Circuit Court of Appeals reversed, holding that a prison guard's attack on an inmate states a claim under the Eighth Amendment, regardless of whether the assault is motivated by a penological purpose. The court looked to this Court's decision in Graham v. Connor, 490 U.S. 386, 395 n. 10 (1989), which cited Whitley v. Albers, 475 U.S. 312, 327 (1979). It noted that for incarcerated persons, the Eighth Amendment is "'the primary source of substantive protection. . . in cases . . .where the deliberate use of force is challenged as excessive and unjustified.'" The court then quoted Cornwell v. Dahlberg, 963 F.2d 912 (6th Cir. 1992), in which the Sixth Circuit Court of Appeals held that a post-conviction excessive force claim "is to be brought exclusively under the Eighth Amendment's cruel and unusual punishment clause." Id. at 915, quoted in, Pelfrey, 43 F.3d at 1036-37.

One Circuit Judge dissented from the decision below, finding that this Court had in Hudson v. McMillian, 112 S.Ct. 995 (1992), reserved the question of whether an isolated assault by a prison guard states a claim under the Eighth Amendment.

None of the judges considering the case noted that the assault at issue was a forced cutting of the hair which has long been recognized as a form of punishment in our society and others worldwide.

II. REASONS FOR DENYING THE WRIT

This case does not deserve Supreme Court Review. At issue is the forced cutting of inmate Pelfrey's hair. Such conduct has long been viewed in this society and others as punishment. Further, when viewed as "a spontaneous, isolated assault by a prison guard on an inmate," Pelfrey v. Chambers, No. C-2-92-225 (S.D. Oh. February 8, 1993), Petitioners Appendix A-23, the complaint most certainly describes a violation of the Eighth Amendment.

A. Forced Hair Cutting is Clearly a Form of Punishment

Men and women convicted of witchcraft from Germany to India and beyond have long been subjected to hair cutting as a form of punishment for their crime. Wendy Cooper, Hair, Sex, Society, Symbolism 197-98 (1971). Similarly,

> [d]eprivation of hair was always regarded as a dreadful form of punishment, a superstition that was exploited to the full by penal authorities in the Dutch East Indies who, by threatening to remove the hair of their prisoners, usually managed to secure an immediate confession without recourse to torture.

Man, Myth & Magic 1107 (Richard Cavendish ed., 1995). French collaborators suffered head shavings at the hands of their government for cooperation with the Germans during World War II, and the Irish Republican Army has shaved the heads of

Catholic women who kept company with Protestant or British men. Anthony Synnott, Shame and Glory: A Sociology of Hair, in 38 The British Journal of Sociology 381, 402 (Christopher Badcock & Percy S. Cohen eds., 1987).

In the United States, officials at the Cook County Jail cut the hair of members of the 'Chicago Seven' in 1970. Student protesters in a Michigan jail the same year were forced to have their hair cut while they awaited release on bond. These and other haircuts imposed on incarcerated individuals were seen as reflecting public "desire to humiliate defendants for being unconventional and disrespectful to society." Raymond Firth, Symbols Public and Private 282 (1973).

Slicing respondent's hair from his head in this case was done to humiliate and threaten him. There is no allegation that it was necessary for security purposes. Rather, like the head shavings and hair cuts traditionally administered to witches, political enemies and prisoners in our society and others, the senseless and malicious conduct alleged in this case is certainly an act of punishment.

B. Eight Recent Decisions From This Court Have Sufficiently Defined the Scope Of Eighth Amendment Prohibitions In The Prison Setting

Including Estelle v. Gamble, 429 U.S. 97 (1976), this Court has recently decided eight cases specifically defining the scope of the Eighth Amendment's protection against cruel and unusual punishment, all but one of them in the prison context. The Court has decided four of these cases in the last

four years.

The Eighth Amendment, as interpreted by this Court, prohibits much more than "physically barbarous punishments." Id. at 102 (holding that deliberate indifference to a prisoner's serious medical needs constituted cruel and unusual punishment under the Eighth Amendment). The "'unnecessary and wanton infliction of pain' [on prisoners]. . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." Ingraham v. Wright, 430 U.S. 651 (1977) (quoting Estelle). In Hutto v. Finney, 437 U.S. 678 (1978) this Court held that inhumane prison conditions, including "unprofessional behavior" by prison staff, violated the Eighth Amendment. See also, Rhodes v. Chapman, 452 U.S. 337 (1981) (conditions other than those in Estelle and Hutto may violate the Eighth Amendment if they are "cruel and unusual" under contemporary standards).

Recent decisions by this Court have focussed particularly on the significance of prison guards' mental state in their potential liability under the Eighth Amendment. Wilson v. Seiter, 111 S.Ct. 2321 (1991) (requiring a showing of deliberate indifference on part of prison officials in order to show that prison conditions constituted cruel and unusual punishment); Hudson, 112 S.Ct. at 1000 (1992) (prisoner with minor injuries stated a claim for excessive force in violation of the Eighth Amendment where "prison officials maliciously and sadistically use force to cause harm. . . whether or not

significant injury is present"); Helling v. McKinney, 113 S.Ct. 2475 (1993) (prison guards' deliberate indifference must be determined "in light of the prison authorities' current attitudes and conduct"); Farmer v. Brennan, 114 S.Ct. 1970 (1994) (prison officials showed deliberate indifference where they knew that inmates faced a substantial risk of serious harm, and they failed to act reasonably to prevent it). These recent decisions have not yet been fully explored by the appellate courts. No new Eighth Amendment decisions are needed to further explain them. This Court should simply allow the law to develop further in this area before accepting another case.

Petitioners and the dissenting panel member in the Court of Appeals suggest that the Eighth Amendment does not reach random and unauthorized acts by individual guards. They rely on Johnson v. Glick, 481 F.2d 1028, and George v. Evans, 633 F.2d 413. Those decisions are inapposite for two reasons. First, the distinction petitioners attempt to create between spontaneous, unauthorized conduct by government officials, and authorized conduct, has been specifically rejected by this Court in similar contexts as a way to determine whether a constitutional right has been violated. See, e.g., Monroe v. Pape, 365 U.S. 167, 186 (1961) (claim stated under Fourth Amendment against city police officers who purportedly violated their own department rules while conducting an allegedly unconstitutional search). See also Tennessee v. Garner, 471

U.S. 1 (1985) (police officer's acts consistent with local law nonetheless violated Fourth Amendment). Second, this Court has disapproved the application of multiple constitutional Amendments in analyzing a government official's allegedly unconstitutional act. See, e.g., Graham v. Connor, 490 U.S. 386, 394 (excessive force claim against police officers who made investigative stop must be reviewed only under Fourth Amendment); Albright v. Oliver, 114 S.Ct. 807 (1994) (malicious prosecution claim is to be analyzed exclusively under Fourth Amendment). Thus, by relying on multiple constitutional theories for a single act, Glick and Evans no longer express the proper constitutional standard. The panel was correct to reject arguments based upon those cases.

C. The Facts Alleged In Respondent's Complaint Place His Claim Squarely Within the Scope of The Eighth Amendment As Interpreted By This Court And The Sixth Circuit Court Of Appeals

The decisions in this Court have left no question as to whether random acts of cruelty by prison guards against prisoners are cognizable under the Eighth Amendment. As explained above, the Court has recognized repeatedly that the Eighth Amendment prohibits more than official acts intended to punish. See Estelle (official actions "incompatible with the evolving standards of decency that mark the progress of a maturing society" violate Eighth Amendment). In Wilson, the Court discussed the meaning of "punishment" in the Eighth Amendment context, as explained by petitioners. But the Court did not exclude conduct outside this definition from the reach

of the Eighth Amendment. On the contrary, Wilson clearly recognized the validity of Eighth Amendment claims "based on official conduct that does not purport to be the penalty formally imposed for a crime," expanding the deliberate indifference standard from Estelle to all such claims. Id. at 2326. Three years ago, the Court held that when "prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated." Hudson, 112 S.Ct. at 1000. The Hudson Court made no exception for excessive force claims involving unauthorized beatings and other uses of force by prison officials; it stated merely that it would not address the respondents' attempt to distinguish this kind of claim from the rest of those cognizable under the Eighth Amendment. Id. at 1001.

Thus the Court of Appeals' decision in this case, that the Eighth Amendment protects prisoners from the isolated assaults formerly analyzed by other courts under the Fourteenth Amendment, is fully consistent with Supreme Court precedent. It also follows precedent set in the Sixth Circuit. In Cornwell v. Dahlberg, 963 F.2d 912, 918 (6th Cir. 1992), the Sixth Circuit followed Graham to hold that a prisoner forced to lie face down in the mud on a 40 degree day stated a claim for excessive force under the Eighth Amendment only.

That a haircut forced by knife and administered by a laughing prison guard is a sufficiently malicious and sadistic act to give rise to a claim under the Eighth Amendment is

thoroughly supported by the Sixth Circuit's previous decisions. Parrish v. Johnson, 800 F.2d 600 (6th Cir. 1986) (prison guard who waived knife in front of a paraplegic prisoner's face once for no reason and a second time to extort potato chips and cookies violated the Eighth Amendment); Moore v. Holbrook, 2 F.3d 697 (6th Cir. 1993) (wantonness of guards' three beatings was disputed fact issue preventing summary judgment). See also Franklin v. Aycock, 795 F.2d 1253 (6th Cir. 1986), citing Glick, 481 F.2d 1028 ("unjustified striking, beating, or infliction of bodily harm upon a prisoner by . . . a correctional officer gives rise to liability under 42 U.S.C. 1983").

D. There Is No Conflict Among The Circuits

The Supreme Court's decision in Graham v. Connor, 490 U.S. 386, has effectively resolved any preexisting conflict among the Circuit Courts of Appeals as to whether the Fourth, Fourteenth or Eighth Amendment protects persons following conviction from unauthorized uses of force. The Sixth and Ninth Circuit decisions following Graham have correctly decided that excessive force claims during arrests are analyzed under the Fourth Amendment while excessive force claims after conviction are to be analyzed under the Eighth Amendment. Cornwell v. Dahlberg, 963 F.2d 912 (6th Cir. 1992); Hirano v. Kakuda, Nos. 92-15076, 92-15091, 92-15854, 92-16398, 1994 U.S. App. LEXIS 8130 at *5 (9th Cir. Jan. 18, 1994) (copies provided by petitioners) (squarely rejecting a prison guard's argument

in reliance on Glick that as an "isolated attack" his conduct toward the plaintiff prisoner should not be within the reach of the Eighth Amendment).[1] The District Court for the District of Hawaii also followed this reasoning. Freitas v. Stone, 818 F.Supp. 1333 (D.Hawaii 1993). See also Rodriguez v. Murphy, No 91-CV-0650E(F), 1994 U.S. Dist. LEXIS 19107 at *13 (W.D.N.Y., December 30, 1994) (analyzing "an isolated assault" under the Eighth Amendment). Duckworth v. Franzen, 780 F.2d 645 (7th Cir. 1985), was decided before Graham, and it did not involve an excessive force claim.[2] Davis v. Locke, 936 F.2d 1208, 1212 (11th Cir. 1991), simply fails to follow Graham.

E. The Facts Of This Case Make It Inappropriate For Review

Petitioners in this case are two prison guards who laughed and grinned while one of them sliced away an inmate's hair with a knife. This use of force is exactly the malicious and sadistic, unjustified behavior by government officials that falls within the scope of the Eighth Amendment. No minimum degree of harm is required to state a claim under the Eighth Amendment. Hudson, 112 S.Ct. at 1000. Rather, the "core judicial inquiry" in such a case is "whether force was applied in a good-faith effort to maintain or restore discipline, or

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[1] The court's reference to the Supreme Court's failure to address this issue in Hudson by no means places the Ninth Circuit's holding in conflict with other circuits.

[2] The court's notation that a guard's beating of a prisoner "to supplement [his] official punishment" would be "punishment" under the Eighth Amendment was made to illustrate the level of intent required to state a claim of deliberate indifference. Id. at 652.

maliciously and sadistically to cause harm." Id. at 998-999.

Prison guards have a duty to ensure "reasonable safety" to prison inmates. Helling, 113 S.Ct. 2475, 2481 (1993), cited by, Farmer, 114 S.Ct. at 1983. The kind of wanton cruelty displayed by petitioners in this case must not be removed from the reach of Eighth Amendment protection. While it is true that "[n]ot every push or shove. . . violates a prisoner's constitutional rights," Hudson 112 S.Ct. at 1000, this is not a case of an inadvertently rough push or shove. This is an example of precisely the "unnecessary and wanton infliction of pain," Ingraham, 430 U.S. at 651, against which the Constitution must protect for those who live each day at the mercy of government officials. Prison guards' discretion and behavior determine the constitutionality of inmates' confinement every minute of the day. See Hudson, 112 S.Ct. at 999, quoting Whitley, 475 U.S. at 321-22 ("'Prison administrators. . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline . . .'"). To remove constitutional protection from malicious behavior by prison guards in this context in which they have such a high degree of discretion, simply because the conduct is characterized as "personal" rather than a matter of policy, would be anomalous at best. In the words of the Court of Appeals, the conclusion urged by petitioners:

> would ignore the power arrangements that exist within the prison environment and lead

> to the anomalous result in which a prisoner who is assaulted after having provoked a guard can state a cognizable claim for a constitutional violation while his cellmate who is assaulted for absolutely no reason is afforded only that relief permitted by state law. Such a result is devoid of all logic and flies in the face of [the Court of Appeals'] previous statement that "the motivation of an assault" is relevant to the question of "whether the measure taken inflicted unnecessary and wanton pain." Moore v. Holbrook, 2 F.3d 697, 700 (6th Cir. 1993).

Pelfrey, 43 F.3d at 1037.

To deny constitutional protection against this kind of conduct would be entirely inconsistent with the Court's consistent recognition of governmental responsibility toward those whom it confines. See Deshaney v. Winnebago County Dep't of Social Servs, 489 U.S. 189 (1989), citing Estelle, 429 U.S. 97 (government's duty to incarcerated); Robinson v. California, 370 U.S. 660, (1962) (same); Youngberg v. Romeo, 457 U.S. 307 (1982) (duty of care to involuntarily committed). The Eighth Amendment embodies "an intention to limit the power of those entrusted with the criminal-law function of government," Ingraham v. Wright, 430 U.S. 651, 664 (1977). To remove its protection in an instance of brazen conduct such as the intimidating slashing of hair in this case would contradict a long history of Eighth Amendment jurisprudence and deny prisoners the only constitutional protection they have against the random abuse of power by the government officials who control their confinement.

IV. CONCLUSION

The Petition for Writ of Certiorari should be denied. The decision of the Sixth Circuit Court of Appeals was correct. Judgment on the pleadings was properly reversed, and the case properly remanded to the district court.

Respectfully submitted,

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